PETITION NOT PRINTED

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CHARLES ELMORE CRO
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# Supreme Court of the United States

OCTOBER TERM, 1948.

No. 581 MISC.

INEZ HORTON GAY,

*Petitioner,*

*against*

FIDELITY UNION TRUST COMPANY, Executor of and Trustee under the Last Will and Testament of INEZ S. HORTON, deceased,

*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.*

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## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

### Opinions Below.

Opinions in this matter were filed by the Essex County Orphans' Court, Prerogative Court and Supreme Court of New Jersey. None of these opinions were reported. They have been set forth in the appendix to this brief at pages 37, 45, and 51, respectively. In addition to the opinions mentioned, the Supreme Court of New Jersey denied a motion for rehearing, which was denied without opinion.

## Jurisdiction.

The petition and petitioner's brief do not in terms state a statutory basis for invoking the jurisdiction of this Court. The respondent assumes that jurisdiction is invoked under 28 U. S. C. § 1257(3).

## Statement.

Typewritten copies of the Petition for a Writ of Certiorari herein, together with the petitioner's brief in support thereof and an affidavit of the petitioner, Mrs. Gay, in *forma pauperis*, were served upon counsel for the respondent without a copy of the printed record as required by paragraph 3, Rule 38 of the Supreme Court of the United States. In view of the fact that the petitioner is appearing *pro se* without counsel and is seeking to prosecute this matter in *forma pauperis*, the respondent, mindful of its fiduciary relationship to the petitioner, is not pressing any technical objections to the state of the record or the form of the papers filed by the petitioner. Although the respondent does not actively raise objections to such matters, it does not, however, waive any such objections as the Court shall deem worthy of consideration in disposing of this proceeding. For similar reasons, the respondent has included in the appendix hereto so much of the record as it deems pertinent so that the Court may have the same available to it.

This petition for certiorari attacks the dismissal by the New Jersey Supreme Court of the present petitioner's appeal to that Court from a judgment entered in the Appellate Division of the Superior Court of New Jersey. The appeal was dismissed on motion of the present respondent on the ground that it was not taken within time.

The controversy in which the present petition had its inception arose when the petitioner filed, by counsel, a petition in the Orphans' Court of Essex County, New Jersey, for the purpose of opening certain decrees which had allowed the intermediate and final accounts of Paul J. Horton and Fidelity Union Trust Company (the present respondent), as Executors of the Last Will and Testament of Inez S. Horton, deceased.

The decedent, Inez S. Horton, was the mother of Inez Horton Gay (the present petitioner) and the wife of Paul J. Horton, one of the executors of and trustees under her will. The basis of the petition in the Orphans' Court was that there had been omitted from the inventory of the decedent's estate filed by the executors numerous chattels, including furniture, silverware, china, and the like, which Mrs. Gay claimed were the property of her mother, therefore passing to her under one of the paragraphs of her mother's will (Appendix p. 53). The relief sought was the reopening of the decrees allowing the executors' previous accounts so that Mrs. Gay might file objections to the accounts, to the end that both executors might become accountable for the chattels.

The Orphans' Court (Appendix p. 37) decided that the accounts should be reopened because of fraud on the part of Paul J. Horton and mistake on the part of the corporate fiduciary, the present respondent. Appeals to the New Jersey Prerogative Court were taken by Paul J. Horton and Fidelity Union Trust Company from this decree. In due course, the Vice Ordinary who heard the appeals handed down a decision dated August 20, 1948, (Appendix p. 45) in which he concluded that the decree of the Orphans' Court, as far as it pertained to Paul J. Horton, should be affirmed but should be reversed as to Fidelity

Union Trust Company. Thus, the respondent was relieved of any responsibility for the chattels claimed by Mrs. Gay, although it continued as trustee of the trust fund of which she is the beneficiary under the will.

In the interim, the Constitution of 1947 of the State of New Jersey had been approved by the electorate and became effective as therein provided. The Judicial Article became effective on September 15, 1948, (New Jersey Constitution 1947, Article XI, Section IV, Paragraph 14; Appendix p. 26). By virtue of Article XI, Section IV, Paragraph 8(b), (Appendix p. 25), the proceeding which was pending in the Prerogative Court was transferred to the Appellate Division of the new Superior Court. No judgment on the Vice Ordinary's opinion having been entered in the Prerogative Court in the last days of the old Constitution, a Judgment of Modification (Appendix p. 55) was presented to Part A of the Appellate Division, with the consents of counsel as to form, including that of counsel for Mrs. Gay. It was not until later that she undertook to conduct these proceedings as her own counsel.

The Judgment of Modification was presented upon notice to Mrs. Gay's counsel and was signed by the Appellate Division pursuant to paragraph 4 of New Jersey Laws of 1948, Chapter 367 (Appendix p. 29). It was signed by Judge Jacobs, the Presiding Judge of the Appellate Division, Part A, in open court on October 6, 1948, in the presence of Judges Eastwood and Bigelow, and was filed and "entered" by the Clerk of the Court on October 13, 1948. Judge Bigelow was the former Vice Ordinary who had handed down the opinion in the Prerogative Court (Appendix p. 45). October 6, 1948, was the first day (after it was constituted on September 15, 1948) that the Appellate Division sat for the purpose of entering a judgment (Appendix p. 70).

On December 3, 1948, the petitioner, by counsel, filed a notice of appeal to the New Jersey Supreme Court from the judgment entered in the Appellate Division (Appendix p. 58).

Thereupon, the respondent moved to dismiss the appeal (Appendix p. 59) on two grounds, viz., (1) that it was not taken within time, and (2) that the appeal from the Final Judgment of the Appellate Division of the Superior Court did not fall within any of the classes of cases wherein an appeal might be taken to the New Jersey Supreme Court under Article VI, Section V, Paragraph 1 of the New Jersey Constitution of 1947 (Appendix p. 24). The New Jersey Supreme Court granted the motion to dismiss the appeal on the ground that it was not taken within time (Appendix p. 51).

Thereafter, the petitioner moved the New Jersey Supreme Court that the dismissal of the appeal be reconsidered and reviewed and that the appeal be allowed to lie (Appendix, p. 62). This motion was denied without opinion (Appendix, p. 52). On February 21, 1949, Final Judgment dismissing the appeal was entered in the New Jersey Supreme Court.

The present petition for writ of certiorari followed.

## Questions Presented.

1. Whether this Court has jurisdiction in the premises.

2. Whether a writ of certiorari should issue.

3. Whether the New Jersey Supreme Court was in error in dismissing petitioner's appeal for not having been filed within time.

## Reasons for Denying the Writ.

The alleged grievance of the petitioner, upon which she bases this proceeding, is the dismissal by the New Jersey Supreme Court of her appeal therein on the ground that it was not taken within time. Aside from formal defects in the within proceeding, the writ should be denied on the following substantial grounds:

1. This Court is without jurisdiction because no Federal question was raised in the courts below. Although the petition and brief filed in support thereof are not altogether clear, the Federal questions which the petitioner appears to be raising are a purported violation of due process and equal protection under the Fourteenth Amendment of the United States Constitution and a violation of "vested rights" under the Fourteenth Amendment. These questions of rights under the Federal Constitution, which the petitioner now claims to have been violated, were never raised in the courts of New Jersey, nor did the State Courts pass upon these matters. The first time any Federal question has been raised is on this petition in this Court, and, accordingly, jurisdiction in this Court is lacking under 28 U. S. C. § 1257(3).

2. No Federal question actually exists. The petitioner failed to take her appeal within the time limited by State law. She now seeks to avoid the effect of her inaction on two grounds, by (1) attacking the Rule of the New Jersey Supreme Court which established the time limit for her appeal to that Court (Petitioner's Brief, p. 4), and (2) by claiming that she has a right to a hearing on the merits in the New Jersey Supreme Court unlimited in time (Petitioner's Brief, p. 6; Petition for Writ of Certiorari, p. 4) by

virtue of New Jersey Laws of 1948, Chapter 367 (Appendix, p. 27). But the right to appeal is a procedural matter and does not constitute a vested right. Assuming, for the sake of argument, that the petitioner had lost her right to appeal to the New Jersey Supreme Court by reason of some action of the Legislature or courts of New Jersey, rather than by her own failure to appeal in time, as actually was the case, still no question of due process would have been raised under the Federal Constitution. Similarly, since there is no showing that there was any discrimination against this petitioner in any respect but that her status under the New Jersey law was identical with that of any other person in similar circumstances seeking to appeal to the New Jersey Supreme Court, there is no question of equal protection under the Fourteenth Amendment.

3. By any test, the time limitation upon the appeal which the petitioner sought to take to the New Jersey Supreme Court was valid and no grounds, therefore, exist for the granting of a writ of certiorari here.

## ARGUMENT.

## POINT I.

**The petition should be denied because this Court is without jurisdiction in the premises.**

This proceeding is apparently grounded, for jurisdictional purposes, upon 28 U. S. C. §1257, Subparagraph (3), as being a case "where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States."

Since the issue is limited to the dismissal of the petitioner's appeal in the New Jersey Supreme Court on a

procedural ground, viz., that it was not taken within time, the raising of a Federal question for jurisdictional purposes would be limited to that proceeding in the New Jersey Supreme Court and not to early stages of the case. Accordingly, there was no occasion for the petitioner to raise a Federal question in the Essex County Orphan's Court, the New Jersey Prerogative Court, or the Appellate Division of the New Jersey Superior Court.

But the petitioner was required under 28 U. S. C. §1257(3) to raise the question in the New Jersey Supreme Court, for it is clearly established that in order to bring a petition for a writ of certiorari under that section, the Federal question must be raised at the proper time and in the proper way in the state court. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291; 47 L. ed. 480; 63 L. R. A. 33 (1903). The Federal question relied upon to confer this jurisdiction cannot first be raised in the Supreme Court of the United States. *Quimby* v. *Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; *Morrison* v. *Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Marrow* v. *Brinkley*, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; *Scudder* v. *Coler*, 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Bergner* v. *Palethorp*, 131 U. S. Appx. CCVIII.; *Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Sweringen* v. *St. Louis*, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569.

It is not raised in time where it first appears in the petition for writ of error from the Supreme Court of the United States to the state court. *Johnson* v. *New York L. Ins. Co.*, 187 U. S. 491, 27 L. ed. 273, 23 Sup. Ct. Rep. 194; *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.*, 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178.

It is essential that at some point in the procedure before the state courts the Federal question relied upon to confer such jurisdiction be presented for decision. *Murdock* v. *Memphis,* 20 Wall. 590, 22 L. ed. 429; *Church* v. *Kelsey,* 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897.

The proceeding in the New Jersey Supreme Court had its inception in the present petitioner's notice of appeal (Appendix p. 58). Thereupon, the present respondent moved to dismiss the appeal as being out of time and on the further ground that an appeal did not lie (Appendix p. 59). Pursuant to Rule 1:6, subparagraph (a), of the rules relating to the Supreme Court of New Jersey,* oral argument was not made.

Mrs. Gay filed a brief in reply to the brief filed in support of the motion by the respondent. She also filed a motion to extend time for filing briefs and appendices. Both the brief and motion to extend time are printed in full in the appendix hereto (Appendix pp. 60 and 61 respectively). Thereafter, the Court handed down its opinion (Appendix p. 51), and the appellant filed her Motion to Review Dismissal of Appeal and Counter-reply Brief on Motion to Review Dismissal of Appeal, both of which are printed in full in the appendix hereto (Appendix pp. 62 and 68 respectively). The abovementioned papers comprise the entire record on behalf of the petitioner in the New Jersey Supreme Court. If she raised a Federal question in that Court, she must have done so in that record.

At no place was a question raised under the Fourteenth Amendment to the Constitution of the United States by the appellant in any of the papers filed by her. Her entire argument was on the basis of the New Jersey Constitution, Statutes and Rules of Court. The opinion on the motion to dismiss the appeal was on the basis of the New Jersey

* "... Oral argument on motions will not be permitted."

Rules of Court. It is true in her "Conclusion" to the Motion to Review the Dismissal of Appeal, in a peroration, the appellant said:

> "Under the democratic laws of this country and the Constitution, I, as a citizen, have a right to my day in Court; and in Equity, which is written in essence in our Constitution, it is not allowable to deprive a free person of his legal rights through legalistic formalities, so far as it is just and practicable and it is just and practicable in this case" (Appendix, p. 64).

It is submitted that this was insufficient to raise the Federal questions under the Fourteenth Amendment now urged by the petitioner. This falls under the requirement that where, as here, the occasion arises under the third clause of the jurisdictional statute (28 U. S. C. §1257) the right, title, privilege or immunity must be "specially set up or claimed". *Chicago & N. W. R. Co.* v. *Chicago,* 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Schuyler Natl. Bank* v. *Bullong,* 150 U. S. 85, 37 L. ed. 1008, 13 Sup. Ct. Rep. 24; *Manning* v. *French,* 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258; *Worthy* v. *Moore County,* 9 Wall. 611, 19 L. ed. 565; *Johnson* v. *New York L. Ins. Co.,* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Sayward* v. *Denny,* 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Morrison* v. *Watson,* 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *French* v. *Hopkins,* 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; *California Powder Works* v. *Davis,* 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Onondaga Nation* v. *Thacher,* 189 U. S. 306, 47 L. ed. 826, 23 Sup. Ct. Rep. 636.

It has been held that the attention of the state court must be directed to the particular section of the Federal Constitution and to the right claimed under it. *Maxwell* v.

*Newbold,* 18 How. 511, 15 L. ed. 506; *Hoyt* v. *Shelden,* 1 Black, 518, 17 L. ed. 65; *Farney* v. *Towle,* 1 Black, 350, 17 L. ed. 216; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

Averments to present such a question must be so distinct and positive as to place it beyond question that the party bringing a case from the state court intended to state a Federal right. *Michigan Sugar Co.* v. *Michigan,* 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; *F. G. Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

Not only must the Federal question have been raised in the state courts by the litigant who attempts to bring the matter to this Court, but the state court itself must have passed upon the Federal question in its decision. *Montgomery* v. *Hernandez,* 12 Wheat. 129, 6 L. ed. 575; *Crowell* v. *Randell,* 10 Pet. 368, 9 L. ed. 458; *M'Kinney* v. *Carroll,* 12 Pet. 66, 9 L. ed. 1002; *Commercial Bank* v. *Buckingham,* 5 How. 317, 12 L. ed. 169; *Taylor* v. *Morton,* 2 Black, 481, 17 L. ed. 277; *Hurley* v. *Street,* 14 Wall. 85, 20 L. ed. 786; *Caperton* v. *Bowyer,* 14 Wall. 216, 20 L. ed. 882; *Detroit City R. Co.* v. *Guthard,* 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; *Israel* v. *Arthur,* 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583.

It is accordingly urged that the one occasion in a rhetorical conclusion where the present petitioner referred to the United States Constitution in the proceedings before the New Jersey Supreme Court does not meet the test of the above authorities, and that the Federal questions which she now raises were not presented to and formed no part of the decision of the state court with the consequence that this Court does not have jurisdiction to grant a writ of certiorari.

## POINT II.

**No Federal questions are raised in the present petition.**

Even if it were held that the jurisdictional requirement of 28 U. S. C. § 1257(3) had been met, no Federal question is in fact raised by the petitioner. The position of the petitioner is that the denial of her appeal by the New Jersey Supreme Court violated three rights of the petitioner under the United States Constitution. They are the equal protection clause of the Fourteenth Amendment; the due process of law clause of the same Amendment; and, by implication, the due process of law clause of the Fourteenth Amendment in that petitioner feels she had a "vested right" to an appeal.

**A. The equal protection clause has not been violated.**

The petitioner has not set forth in her petition or brief in support thereof wherein she feels that the dismissal of her appeal denied her equal protection of the laws. As this Court has said:

> "• • • the equal protection clause of the 14th Amendment is not violated by diversity in the jurisdiction of the several courts of a state as to subject-matter or finality of decision if all persons within the territorial limits of the respective jurisdiction of the state courts have an equal right in like cases under like circumstances to resort to them for redress."

*Ohio Ex Rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 74 L. ed. 710, at 281 U. S., p. 81. Like treatment of all persons similarly situated is all that is required by the equal protection clause of the Fourteenth Amend-

ment. *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527, 75 L. ed. 1248, at 283 U. S., p. 542; *Walston* v. *Nevin*, 128 U. S. 578, 32 L. ed. 544.

Actually, of course, when the equal protection clause is invoked, there is almost always a showing or at least claim of a discrimination, classification or other circumstance wherein the claimant feels he is not receiving the same treatment as others. There is nothing in this case which raises any such problem. The New Jersey Supreme Court did not deny the plaintiff's right to appeal but merely found that she had not appealed within time under rules promulgated for the governance of all. There is no element in the case which would indicate or could be argued to indicate that another person similarly situated as the petitioner, having taken an appeal to the New Jersey Supreme Court under like circumstances as she did, would not also be out of time. It follows that the equal protection clause of the Fourteenth Amendment is not involved herein. Even if the petitioner's contention were well taken, a position which we shall have occasion to refute (below, p. 17) in the discussion of her appeal in the New Jersey Supreme Court on the merits, there would still have been no Federal question under the equal protection clause of the Fourteenth Amendment. As this Court said in *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 42 L. ed. 853, at 169 U. S., p. 570:

> "There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each is preserved the essential elements of protection."

And again, *ibid.*, at page 571:

> "The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of

procedure, and that another party similarly situated is not entitled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure, and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure."

**B. The petitioner has not been denied due process under the Fourteenth Amendment.**

The right of appeal is not essential to due process of law under the Fourteenth Amendment. *Reetz* v. *Michigan*, 188 U. S. 505, 47 L. ed. 563; *District of Columbia* v. *Clawans*, 300 U. S. 617, 81 L. ed. 843; *Lott* v. *Pittman*, 243 U. S. 588, 61 L. ed. 915. An appellate review is not essential to due process of law but is a matter of grace. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 71 L. ed. 394, and cases cited at 272 U. S. 536.

Accordingly, even if it were to be conceded, which the respondent does not do, that the Rule of the New Jersey Supreme Court upon which that Court based its decision that the petitioner's appeal was not taken within time denied her a right of appeal, there would still have been raised no question of due process under the Federal Constitution.

**C. The petitioner had no "vested right" in an appeal.**

At the end of the first paragraph of her petition, Mrs. Gay states that the Rules of the new New Jersey Supreme

Court, by which she feels herself aggrieved, went into effect after her "right of appeal had vested". She also quotes from New Jersey Laws of 1948, Chapter 367, paragraph 6 (page 3 of petitioner's brief in support of petition for writ of certiorari), which provides for extensions of time, opening of defaults, and the like, "unless a vested right intervenes".

Presumably, the petitioner has attempted to establish that she possessed a vested right in an appeal which was protected under the due process clause of the Fourteenth Amendment of the United States Constitution as against actions of a state (assuming that such "vested rights" are protected by the Fourteenth Amendment). Yet there is no such thing as a vested right in an appeal. The extreme case to demonstrate this proposition will be found in *Baltimore & Potomac R. R. Co.* v. *Grant,* 98 U. S. 398, 25 L. ed. 231. In that case a judgment for $2,250.00 had been obtained in the Supreme Court of the District of Columbia. The defendant below sued out a writ of error in this Court. When he commenced the proceeding in this Court, the amount of the judgment against him was sufficient to bring the matter within this Court's jurisdiction, which was limited to matters involving over $1,000.00. While the matter was pending in this Court, the Congress raised the jurisdictional limit to $2,500.00 so that the judgment was beneath the limit. The writ was dismissed, Mr. Chief Justice Waite saying, at 25 L. ed. 232:

> "But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary."

The Baltimore & Potomac case involved an appellate proceeding which was authorized by statute when instituted but which fell by the force of an intervening statute subsequently passed when the proceeding was pending. There an appeal which had already been perfected did not give the appellant a "vested right" under the constitutional guarantee. It follows, therefore, that no "vested right" was affected by the change in the time limiting appeals when the new New Jersey Constitution came into effect. Indeed, as we have pointed out above, no judgment from which an appeal could have been taken under the old rules was ever entered in the New Jersey Prerogative Court. There was nothing for the petitioner to appeal from until a judgment was entered. The judgment was entered after September 15, 1948, when the new rules went into effect. There is no ambiguity in the provisions of those rules as will be demonstrated in our discussion below (p. 17), and the petitioner was represented by counsel both at the time the judgment was entered and when the notice of appeal from that judgment was filed on her behalf out of time. In the light of the holding of the *Baltimore & Potomac* case, it follows *a fortiori* that the petitioner had no vested right in an appeal here.

The doctrine of the *Baltimore & Potomac* case, to the effect that a party to a suit has no vested right in an appeal, is supported by numerous other cases in this Court. *Gwin* v. *United States*, 184 U. S. 669, 46 L. ed. 741; *Crane* v. *Hahlo*, 258 U. S. 142, 66 L. ed. 514, and cases therein cited.

There being no "vested right" in an appeal, no Federal question was raised by the dismissal of the petitioner's appeal by the New Jersey Supreme Court.

It may be concluded on this point, therefore, that since no Federal question is raised by the petitioner, that the petition for a writ of certiorari should be denied.

## POINT III.

**The petitioner's appeal was dismissed by a proper application of valid rules of procedure.**

Even if this matter were to be considered on the merits, it appears from the record that the New Jersey Supreme Court's dismissal of the petitioner's appeal was correct.

The petitioner argues two points against the action of the state court.

Her first point is that under the old procedure which was superseded on September 15, 1948, when the new State Constitution went into effect, she would have had three months to appeal from a judgment or decree of the Prerogative Court. This fact is conceded and will appear from the provisions of the prior law set forth below at page 26.

It will be remembered, however, that no judgment or decree was entered in the old Prerogative Court (above p. 4). Mrs. Gay argues, however, that since she would have had three months to appeal had the judgment been entered in the old Prerogative Court before September 15, 1948, she should still have three months from the entry of the judgment in the successor court, the Appellate Division of the Superior Court of New Jersey (Brief, p. 4).

A brief examination of the applicable provisions of law will disclose, however, that the 45 day limit upon the time for taking her appeal (New Jersey Supreme Court Rule 1:2-5(a), Appendix, p. 35) applied in this case.

At the outset it may be observed that the petitioner makes a point of the fact that the judgment entered upon the Vice Ordinary's opinion dated August 20, 1948, was not signed by the Appellate Division until October 8, 1948 (Petition for Writ of Certiorari, p. 2). Under the circum-

stances, there was no delay in the entry of the judgment. Truly, the opinion was dated August 20 but was not mailed to counsel by the Vice Ordinary's office until August 23 (Appendix, p. 70). Thereupon, counsel for the parties were engaged in drafting the judgment which was entered with the consents of all counsel, including counsel for the petitioner (Appendix, p. 55). After Labor Day, which fell on September 6, 1948, the only day on which Vice Chancellor Bigelow sat and on which the Judgment of Modification might have been submitted to him for signature was the following day, September 7. After September 7, in anticipation of the new judicial system going into effect, Vice Chancellor Bigelow, along with the other Vice Chancellors, did not sit. In view of these facts it is submitted that no unreasonable delay may be adduced from the fact that a judgment on the Vice Chancellor's opinion of August 20 was not ready for submission by September 7.

Thereafter, on September 15, 1948, the Prerogative Court was abolished (New Jersey Constitution of 1947, Article XI, Section IV, Paragraph 3, Paragraph 14; Appendix, pp. 25, 26). At that time the cause was pending on appeal in the Prerogative Court and was transferred to the Appellate Division of the Superior Court by Article XI, Section IV, Paragraph 8(b) of the new Constitution (Appendix, p. 25).

The power and duty to enter the judgment on the Vice Ordinary's opinion was accordingly transferred to the Appellate Division of the Superior Court by virtue of the cited constitutional provision, as well as New Jersey Laws of 1948, Chapter 367, Paragraph 4, which, by its 17th paragraph, became effective September 15, 1948 (Appendix, pp. 29, 32).

The judgment with consents of all counsel as to form was presented to the Appellate Division at its first sitting

on October 6, 1948 (Appendix, p. 70). The date of entry of the judgment was a week later, October 13, 1948 (Appendix, p. 55). (This delay between the signing and "entering" of the judgment inhered to the petitioner's advantage because the time for the taking of her appeal commenced on the date of entry rather than on the date of signing of the judgment, as will appear below, p. 20).

The old Prerogative Court and the old Court of Errors and Appeals, to which an appeal from the Prerogative Court would have been taken under the former procedure, having been abolished on September 15, 1948, (New Jersey Constitution of 1947, Article XI, Section IV, Paragraph 3, Appendix, p. 25), and the judgment accordingly being required to be entered in the Appellate Division of the Superior Court, as demonstrated above, an appeal now lay to the New Jersey Supreme Court, under Rules governing the Supreme Court, 1:2-1, and under Article VI, Section V, paragraph 1 of the New Jersey Constitution of 1947, in five classes of cases (Appendix, pp. 33, 24). It may be noted in passing that the motion to dismiss the appeal included among its grounds the fact that the appeal did not fall within any of those classes (Appendix, p. 59), but the appeal was dismissed without discussing this point (Appendix, p. 51).

The authority for the promulgation of Rules governing the Courts of the State of New Jersey by the Supreme Court appears in Article VI, Section II, Paragraph 3 of the New Jersey Constitution of 1947 (Appendix, p. 24). Under the rules so promulgated an appeal is taken, where permitted, by serving a copy of a notice of appeal and by filing the same with the Clerk of the Court from which the appeal is taken (Rule 1:2-4 (Appendix, p. 33)). Since the notice of appeal by the present petitioner was served and filed on

December 3, 1948 (Appendix, p. 58), the appeal was taken on that day.

The appeal was taken from a Final Judgment of the Appellate Division (Appendix, p. 55) and, therefore, under Rule 1:2-5(a) (Appendix, p. 35), it was, if permitted to be taken at all, required to be taken within 45 days of December 3, 1948.

Under Rule 1:7-8 (Appendix, p. 36), the day of the entry of the judgment is not to be computed, but the last day of the period to be computed is to be included.

Accordingly, the 45 days after October 13, 1948, the date of entry of the judgment, expired on November 27, which was a Saturday. Rule 1:7-8 provides that Saturdays shall not be considered as holidays. Since the time for taking an appeal expired on November 27, the taking of the appeal on December 3, 1948, was out of time and the holding of the New Jersey Supreme Court on that point (Appendix, p. 51) was correct.

It is to be noted that the footnote appended to Rule 1:2-5 (Appendix, p. 35) with respect to appeals from a judgment entered prior to September 15, 1948, does not apply because no judgment was entered prior to that date. It goes without saying that the time for appeal runs from the entry of the judgment and not from the date of the opinion by the Court below as argued on page 6 of the petitioner's brief.

It is also to be noted that Rule 1:7-9, (Appendix, p. 36) which provides for relaxation of the rules of the court, specifically excludes from such relaxation the time of taking an appeal under the aforesaid Rule 1:2-5. This follows from the fact that upon the expiration of the time to appeal, rights under a judgment from which an appeal might have been taken become vested and cannot be abrogated. See *Smith* v. *Walton*, 96 N. J. Eq. 421, 125 Atl. 878, (Ch., 1924),

in which the following language of Chief Justice Gummere in *Plahn* v. *Givernaud,* 85 N. J. Eq. 143, 96 Atl. 40, (Ct. of E. & A., 1915), at page 146, appears:

> "We are not to be understood as denying the power of the legislature to extend the time of appeal before that right had expired by limitation. What we do determine is that a statute like that, which we have been discussing, is unconstitutional, so far as it operates to revive a right of appeal after it has expired under the existing law, and property rights have thereby become vested."

Similarly, in *Mackay* v. *Mackay,* 83 N. J. Eq. 650, 91 Atl. 316, (Ct. of E. & A., 1914), the court concluded, at page 652:

> "The appeal not having been taken within the time prescribed by law, the matter is not properly before us and will not be considered."

It follows that under the Constitution and Laws of the State of New Jersey, the granting of the present respondent's motion to dismiss the petitioner's appeal on the ground that it was not taken within time was in all things proper and correct.

## POINT IV.

**New Jersey Laws of 1948, Chapter 367, did not give the petitioner a right to a hearing on the merits in the New Jersey Supreme Court.**

The petitioner has quoted at some length from Chapter 367, New Jersey Laws of 1948 (p. 3 of her brief) and argues *passim* that by virtue of that statute she is entitled to a review on the merits of the judgment entered in the Appellate Division of the Superior Court of New Jersey.

The recitals in the preamble to that statute, which has been set forth in full herein, (Appendix, p. 27) and the provisions of the enacting portion thereof amply demonstrate that the purpose of the statute was to give legal authority to the courts under the new dispensation to carry on from the point at which they commenced their functions which were transferred from the old courts. In line with the purpose of that statute it is couched in broad language of a permissive nature so that there might be no doubt of the authority of any of the new courts to act upon matters coming before them by way of transfer from the old courts.

But the petitioner argues that this statute entitled her to an appeal as of right at any time, regardless of limitations of time imposed by the duly adopted rules of court. It is submitted that nothing in that statute gives any such right. Indeed, rather than giving a litigant an absolute right to an appeal on the merits, as argued by the petitioner (Brief bottom p. 6), the statute, insofar as it refers to the action to be taken by courts to which causes are transferred by the new Constitution, is permissive leaving such action to the discretion of the courts.

Even had the petitioner the right to appeal on August 20, 1948, the date of the Prerogative Court's opinion on which no judgment had yet been entered, under the footnote to Rule 1:2-5 the time to appeal would have been 45 days from September 15, 1948 (paragraph (b) of the footnote, Appendix, p. 35), because such date would have been earlier by the terms of the footnote than three months after August 20, 1948. Actually, the petitioner had 45 days from a much later date, viz., October 13, 1948, the date of entry of the judgment (Appendix, p. 55). As we observed before, the petitioner was represented by counsel when the judgment was entered in the Appellate Division and when her notice

of appeal was filed (Appendix, p. 58) after the time limited therefor.

The essence of the matter is that the petitioner was late in filing her notice of appeal for which she had ample time. She was in complete control of her actions and should abide by the consequences thereof.

## Conclusion.

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

CHARLES DANZIG,
CHARLES W. KAPPES, JR.,
*Of Counsel.*

# APPENDIX.

## Constitutional and Statutory Provisions and Court Rules Involved.

The Fourteenth Amendment to the Constitution of the United States, Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*The Constitution of 1947 of the State of New Jersey*, Article VI, JUDICIAL, Section II, Paragraph 3:

> "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

Article VI, JUDICIAL, Section V, Paragraph 1:

> "1. Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> (b) In causes where there is a dissent in the Appellate Division of the Superior Court;

(c) In capital causes;

(d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the County Courts and the inferior courts; and

(e) In such causes as may be provided by law."

Article XI, SCHEDULE, Section IV, Paragraph 3, Paragraph 8 and Paragraph 14:

"3. The Court of Errors and Appeals, the present Supreme Court, the Court of Chancery, the Prerogative Court and the Circuit Courts shall be abolished when the Judicial Article of this Constitution takes effect; and all their jurisdiction, functions, powers and duties shall be transferred to and divided between the new Supreme Court and the Superior Court according as jurisdiction is vested in each of them under this Constitution."

"8. When the Judicial Article of this Constitution takes effect:

(a) All causes and proceedings of whatever character pending in the Court of Errors and Appeals shall be transferred to the New Supreme Court;

(b) All causes and proceedings of whatever character pending on appeal or writ of error in the present Supreme Court and in the Prerogative Court and all pending causes involving the prerogative writs shall be transferred to the Appellate Division of the Superior Court;

(c) All causes and proceedings of whatever character pending in the Supreme Court other than those stated shall be transferred to the Superior Court;

(d) All causes and proceedings of whatever character pending in the Prerogative Court other than those stated shall be transferred to the Chancery Division of the Superior Court;

(e) All causes and proceedings of whatever character pending in all other courts which are abolished shall be transferred to the Superior Court.

For the purposes of this paragraph, paragraph 4 and paragraph 9, a cause shall be deemed to be pending notwithstanding that an adjudication has been entered therein, provided the time limited for review has not expired or the adjudication reserves to any party the right to apply for further relief."

"14. The Judicial Article of this Constitution shall take effect on the fifteenth day of September, one thousand nine hundred and forty-eight, except that the Governor, with the advice and consent of the Senate, shall have the power to fill vacancies arising prior thereto in the new Supreme Court and the Superior Court; except further that any provision of this Constitution which may require any act to be done prior thereto or in preparation therefor shall take effect immediately upon the adoption of this Constitution."

N. J. S. A. Title 2, Administration of Civil and Criminal Justice, Chapter 30, Procedure in Prerogative Court, Article 3, Appeals, Section 2:30-16:

"2:30-16. To court of errors and appeals:

Any person aggrieved by an order or decree of the prerogative court may appeal therefrom, in whole or in part, to the court of errors and appeals, which appeal shall be taken within the same time and prosecuted in like manner as appeals from the court of chancery."

*Constitutional and Statutory Provisions and Court Rules Involved.*

N. J. S. A. Title 2, Administration of Civil and Criminal Justice, Chapter 29, Procedure in Court of Chancery, Article 16, Appeals, Section 2:29-119:

> "2:29-119. Time for appeal from final decree; extension:
>
> All appeals from final decrees shall be taken within three months after filing such decrees; provided, that in all cases where final decree has been or may be filed, after June second, one thousand nine hundred and thirty-seven, the chancellor may, in his discretion, by order made not more than thirty days after the time herein above limited for taking an appeal, extend the time of the appellant for taking his appeal for a period not exceeding thirty days from the expiration of the time so limited."

NOTE: The two foregoing sections of the New Jersey Statutes Annotated, viz., 2:30-16, 2:29-119, became ineffective upon the abolition of the old Court of Chancery and Prerogative Court on September 15, 1948.

New Jersey Laws of 1948, Chapter 367:

CHAPTER 367

**AN ACT concerning the administration of justice and regulating the causes and proceedings pending in the courts upon the taking effect of the Judicial Article of the Constitution and which are transferred to the courts established by said Judicial Article.**

**WHEREAS, The Judicial Article of the Constitution of 1947 takes effect on the fifteenth day of September, one thousand nine hundred and forty-eight; and**

**WHEREAS, Paragraph 8 of Section IV of Article XI of the Constitution transfers, when the said Judicial Article**

takes effect, causes and proceedings to the courts established by said Judicial Article; and

WHEREAS, The Legislature is directed by Paragraph 2 of Section I of Article XI of the Constitution to enact all laws necessary to make the Constitution fully effective; now, therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. As used in this act, the following terms shall have the following meaning: "Constitution" shall mean the Constitution of one thousand nine hundred and forty-seven; "causes and proceedings" shall mean and include all actions, suits and special proceedings, statutory or otherwise, and controversies of a justiciable nature, whether constituting the whole or a part of any such action, suit or special proceeding within the meaning of Paragraph 8 of Section IV of Article XI of the Constitution.

2. The purpose of this act is to facilitate the transfer of causes and proceedings pending in the courts on September fifteenth, one thousand nine hundred and forty-eight, according to the provisions of Paragraph 8 of Section IV of Article XI of the Constitution so as to obviate doubts, advance justice and expedite the further prosecution of said causes and proceedings, and to fully protect the rights and interests of the parties to such causes and proceedings.

3. On or after September fifteenth, one thousand nine hundred and forty-eight, all pleadings and other papers filed in any cause or proceedings transferred pursuant to the provisions of Paragraph 8 of Section IV of Article XI of the Constitution shall be entitled in the name of the court to which such cause or proceeding is transferred and such cause or proceeding shall be conducted as nearly as may be in accordance with the practice and procedure applicable

to causes and proceedings of the same character in such court.

4. The court to which any such cause or proceeding is so transferred shall have power to hear and determine any issue or other matter arising or involved therein as fully and to the same effect, and shall have power to issue any writ, make any order, judgment or direction in respect thereto as the court from which the cause or proceeding was transferred could have done had the Constitution not been adopted and shall have such additional powers in relation thereto as may be vested in it by the Constitution to hear any additional controversies in connection therewith and to fully and finally determine and enforce the rights of the parties thereto according to the right and justice of the matter.

5. The court to which any such cause or proceeding is so transferred shall also have the power to issue any writ, make any order, judgment and direction, in respect thereto, which may be necessary to preserve the status quo, and fully and finally determine and enforce the rights of the parties thereto according to the right and justice of the matter.

6. Notwithstanding any former rule of court or contrary statutory provision, extensions of time may be granted, defaults may be opened, and relief afforded, to the parties to any such cause or proceeding, in respect thereto, unless a vested right intervenes.

7. In any cause or proceeding so transferred, notwithstanding that an adjudication has been entered therein, the court to which the same is transferred may order a new trial, grant a re-hearing, stay proceedings, recall a remittitur, allow a review, issue a scire facias, certify a return, and afford any relief, in similar manner and to the same effect as the court from which the cause or proceeding was

transferred could have done had the new Constitution not been adopted.

8. In respect to any such cause or proceeding so transferred to the Supreme Court, the Chief Justice of that court shall have the power to grant any relief and make any order, certification or return that could have been made by the Chancellor or former Chief Justice had the Constitution not been adopted.

9. In respect to any such cause or proceeding so transferred to the Superior Court, any judge of that court, when authorized by a rule of the Supreme Court may make any order, certification or return that could have been made by the Chancellor, the former Chief Justice, by a Justice of the Supreme Court or Judge of the Circuit Court, had the Constitution not been adopted.

10. All writs, process, rules, orders, notices and the like, issued, made or given prior to September fifteenth, one thousand nine hundred and forty-eight, in any cause or proceeding so transferred and returnable after said date either in the court in which it was issued, made or given or in any court succeeding to the jurisdiction of such court, shall be deemed to be returnable in the court to which such cause or proceeding is transferred and action thereon may be taken by the court or the clerk of the court or by any judge thereof holding the court in the same manner as nearly as may be and to the same effect as though the same had been issued, made or given in such court.

11. Wherever in any cause or proceeding any writ, process, rule, order, notice, or the like issued or given prior to September fifteenth, one thousand nine hundred and forty-eight, was made returnable in or before a court, or judge thereof, to be established by the Judicial Article of the Constitution, the same shall be effective notwithstanding that said Judicial Article had not gone into effect.

*Constitutional and Statutory Provisions and Court Rules Involved.*

12. Appeals taken prior to September fifteenth, one thousand nine hundred and forty-eight, and pending on said date shall be heard and disposed of by the court to which the same is transferred by the Constitution. Where an appeal has not been so taken but may be taken thereafter from an adjudication made prior to said date, it shall be taken as follows:

(1) From the Court of Chancery—to the Supreme Court.

(2) From the former Supreme Court—to the Supreme Court.

(3) From the Prerogative Court—to the new Supreme Court.

(4) From the Circuit Court of a county—to the Supreme Court.

(5) From the Court of Oyer and Terminer of a county, in a capital case—to the Supreme Court.

(6) From the Court of Oyer and Terminer, in other than a capital case, the Court of Quarter Sessions, the Court of Special Sessions or the Common Pleas Court, of a county—to the Appellate Division of the Superior Court.

(7) From the Orphans' Court of a county—to the Appellate Division of the Superior Court.

(8) From any other court, where an appeal could have been taken to the former Supreme Court, or to the Prerogative Court, had the Constitution not been adopted—to the Appellate Division of the Superior Court.

13. In any cause or proceeding, so transferred, the final determination thereof, on appeal, by the Appellate Division

of the Superior Court, shall be appealable to the Supreme Court, if an appeal could have been taken to the Court of Errors and Appeals from the former Supreme Court had the Constitution not been adopted.

14. All causes and proceedings involving the prerogative writs, so transferred to the Appellate Division of the Superior Court, shall be heard and disposed of in said division, but where evidence is to be taken in such cause or proceeding, the evidence may be taken before a judge of the Law Division of such court upon such terms as the Appellate Division deems proper and upon completion of the taking of the evidence it shall be made a part of the record before the Appellate Division.

15. Any party to a cause or proceeding, so transferred, may apply, on notice to the adverse party, to the court, or a judge thereof, to which the cause or proceeding is transferred, for a hearing or for direction as to the manner in which such cause or proceeding shall be further prosecuted, and the said court or judge shall grant such hearing or make such direction as will protect the rights of the parties and provide for a disposition of the cause or proceeding on the merits.

16. This is a remedial act and shall be liberally construed to prevent surprise and injustice to the litigants concerned with such pending causes and proceedings.

17. This act shall take effect September fifteenth, one thousand nine hundred and forty-eight.

## Rules Governing the Courts of the State of New Jersey Promulgated by the New Jersey Supreme Court and Effective September 15, 1948.

1:2-1. Appeals in General:

Appeals may be taken to this court from final judgments:

(a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State:

(b) In causes where there is a dissent in the Appellate Division of the Superior Court;

(c) Directly from the trial courts in capital causes;

(d) On certification by this court to the Superior Court, to the County Courts and to all other courts pursuant to Rule 1:5; and

(e) In such causes as may be provided by law.

1:2-4. Notice of Appeal, and Preparation of Transcript:

(a) Where an appeal is permitted, it may be taken in any cause by serving a copy of a notice of appeal upon the attorney for the respondent and filing the notice in duplicate with service acknowledged on one copy, or with an affidavit of service annexed thereto, with the court from which the appeal is being taken. The clerk of said court shall immediately forward one fully conformed copy of said notice to the clerk of the court to which the appeal is taken, for docketing. In capital causes where the sentence of death has been imposed, the attorney of the condemned shall serve forthwith upon the principal keeper of the state prison, a copy of the notice of appeal, certified to be a true copy by the County Clerk. A sentence of death shall be stayed by the principal keeper on the taking of an appeal.

(b) In civil causes the notice of appeal shall specify the parties taking the appeal and shall designate the judg-

ment or part therof appealed from, and the name of the court to which the appeal is taken.

(c) In criminal causes the notice of appeal shall set forth the name and address of the appellant, a concise statement of the offense and of the judgment, giving its date and any sentence imposed the place of confinement, if the defendant is in custody, and the name of the court to which the appeal is taken.

(d) Where an appeal is taken from a court in which a stenographic report of the evidence or proceedings was taken, the appellant, on or before the date of filing the notice of appeal, shall serve upon the stenographic reporter who reported the cause, or his successor, a written request for the preparation of one original and one first carbon copy of the transcript to be used on appeal, and shall deposit with him a sum sufficient to pay such fees as may be required by law. The stenographic reporter shall promptly prepare such transcript in accordance with the standards fixed by this court from time to time, and shall file the two copies of the transcript with the clerk of the court from which the appeal is being taken, notifying the attorney of each of the parties forthwith. The provisions of this paragraph shall not apply, if the original and first carbon of the transcript have already been prepared and are on file with the court.

(e) When an appeal is taken in a cause in which the parties, prior to the taking of the appeal, have signed an Agreed Statement in Lieu of Record, pursuant to Rule 1:2-22, the provisions of paragraph (d) of this rule shall not apply.

(f) Where an appeal is taken from a court in a cause in which no stenographic report of the evidence or proceedings was made the appellant shall proceed in accordance with the provisions of Rule 1:2-22 or 1:2-23.

(g) The provisions of this rule shall not apply to appeals taken pursuant to Rule 3:81-8.

1:2-5. TIME FOR APPEAL:*

Where an appeal is permitted, it shall be taken to the appropriate appellate court within the following periods of time after the entry of the judgment, order or determination appealed from:

(a) Final judgments of the Appellate Division, 45 days, unless a shorter time is provided by law.

(b) Final judgments of the County Courts, or trial divisions of the Superior Court, in civil causes 45 days, and in criminal causes 6 months, unless a shorter time is provided by law.

(c) Final judgments of the Juvenile and Domestic Relations Courts, 45 days.

(d) Final judgments of conviction of contempt, 10 days.

(e) Any other final judgments, 30 days.

(f) Final agency decisions 30 days, except here the time shall run from the date of the service of the decision of the agency.

(g) Interlocutory judgments, orders or determinations, 30 days.

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* Appeals from Judgments, Orders or Determinations Entered Prior to September 15, 1948.

Where an appeal is permitted under these rules, from a judgment, order, or determination, entered prior to September 15, 1948, it shall be taken on or before the earlier of the following 2 dates:

(a) The last day limited for the taking of an appeal by the law in effect when such judgment, order, or determination was entered; or

(b) The last day limited for the taking of an appeal by Rule 1:2-5, reckoning September 15, 1948 as the date from which the time for taking an appeal shall run.

1:7-8. Computation of Time in All Courts:

In computing any period of time the day of the act or event after which the designated period begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. Saturdays shall be considered as other days and not as holidays.

1:7-9. Relaxation of Rules:

The rules of the court shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any cases where it shall be manifest to the court that a strict adherence to them will work surprise or injustice, except that the court may not extend the time for taking any action under Rule 1:2-5.

## Opinion.

Appearances:

MILTON M. and ADRIAN M. UNGER (MILTON M. UNGER) for Petitioner,

EMERSON, EMERY & DANZIG (EDWARD J. BROWN), for Fidelity Union Trust Company, Executor and Trustee,

MCCARTER, ENGLISH & STUDER (GEORGE W. C. MCCARTER) for Paul J. Horton, individually and as Executor and Trustee.

CONLON, J.:

The Petitioner, Inez Horton Gay is the daughter and only surviving child of the deceased. She was granted a Rule addressed to her father, Paul J. Horton and the Fidelity Union Trust Company as Executors of the last will and testament of the deceased, calling upon them to show cause why the decrees of this Court heretofore entered, approving the Intermediate and Final Accounts of the Executors, should not be vacated and the Petitioner allowed to file exeptions thereto. The ground of the application is fraud and mistake. Upon the return of the Rule extensive testimony was taken and briefs filed by all the parties.

The Petitioner's case is based upon the provision of the Orphans' Court Act (Rev. St. 3:10-18) which provides that the decree of this Court on a final account of a fiduciary shall be conclusive on all legatees "except * * * in cases where a person applying for re-settlement proves fraud or mistake in the account to the satisfaction of the Court."

Whether a final settlement of an estate should be opened on the ground of fraud or mistake lies in the discretion of the Court, but that discretion should not be exercised in favor of the applicant unless the proof is clear and convincing. Where the orderly processes of the Court have

been followed—as they have in this case—by formal application, due notice and open hearing to obtain this Court's approval of the settlement, the fiduciaries are entitled to immunity from future claims unless it appears clearly from the evidence that the Court's approval has been obtained by either fraud or mistake to the detriment of the beneficiary. *In re Hazeltine,* 119 N. J. E. 308; affirmed 121 N. J. E. 49.

In the instant case the conclusion is that the approval of this Court to the accounts of the fiduciaries was in fact obtained by the fraud of one executor and the mistake of the other. In view of that conclusion and the consequent opening of the former decrees, a rather extended exposition of the reasons for that determination is in order.

The decedent, Inez S. Horton, died on March 15th, 1932 leaving a will appointing her husband, Paul J. Horton and the Fidelity Union Trust Company Executors and Trustees. Parts of that will are pertinent to this issue. The Second paragraph provided as follows:

> "Second: I give and bequeath all my jewelry, silver, linens and personal articles to my daughter, Inez Stengel Horton."

The residuary clause provided as follows:

> "Third: All the rest, residue and remainder of my estate, both real and personal, wheresoever situate and of whatsoever constituted, I give, devise and bequeath unto my son, Henry Stengel Horton, and my daughter, Inez Stengel Horton, share and share alike, but I direct that the same shall be held by my executors in trust for them, investing and reinvesting the same, paying to them the net income therefrom in equal shares, until they respectively attain the age of thirty years, at which time I direct that the principal shall be paid over to them, share and share alike, for their own use and benefit. If

either of my said son or daughter shall die before reaching the age of thirty years, leaving issue surviving, I direct that such issue shall take the share the parent would have taken if living; but if either of them shall die before reaching the age of thirty years, without leaving issue surviving, I direct that the survivor shall take the entire estate upon reaching the age of thirty years. If at any time during the continuance of said trust, it shall be either necessary or advisable, in the judgment of the trustees, to expend any part of the principal of said trust for the care, comfort, education or maintenance of my said children, then and in every such event, I authorize and direct said trustees to use so much of the principal as they shall deem either necessary or advisable for that purpose. If I shall leave any other child or children me surviving, I direct that such child or children shall share with my said son and daughter, equally in my estate, both as to income and principal and under the same terms, conditions and trusts."

At the time of her death, the deceased left her surviving her husband and the Petitioner herein, Inez Horton (now Gay) who was born on August 24, 1921. Hence, at the time of her mother's death Petitioner was ten years old.

The first account of the executors and the original inventory and appraisement was approved by this Court on September 12, 1939. Petitioner was then eighteen years old. No guardian ad litem was appointed for her nor did she have any representation in those proceedings. At that time the rules of this Court permitted but did not require the appointment of a guardian ad litem. (*Brown* vs. *Fidelity Union Trust Co.*, 135 N. J. Eq. 404). However, due notice of the accounting proceedings was mailed to Petitioner.

*Opinion.*

The next and final account of the executors was approved by this Court on July 17, 1945—the Petitioner then being twenty-four years old. She had no representation in those proceedings. At that time an Order for Distribution was duly applied for and entered. The only effect of that Order was to permit the Executors to turn over the residual assets of the Estate to themselves as Trustees for the benefit of the Petitioner.

The Intermediate account filed by the Executors in 1939 showed the value of the Estate—i.e. such part of it as was inventoried—at $20,900.13. The Final Account filed on July 17, 1945 showed a capital loss of some $5,500.00. No explanation of that loss was ever made by either Executor to the Petitioner, nor does it appear that she ever even knew about it. She makes no claim with reference to it now, but the fact that the Executors did not inform her of it is indicative of their arbitrary attitude and their failure to realize their moral and legal obligations to a beneficiary who had but recently come of age.

The gravamen of the Petitioner's contention is that at the time of her mother's death, the latter was possessed of jewelry, linens and household furnishings which she valued at approximately $28,000; that those articles passed to her under the Second clause of her mother's will; that with some few exceptions those articles were in her father's home in Montclair; that she always presumed that they were hers; that she did nothing at the time of the filing of the accounts to protect her legal rights thereto because she had had her father's assurance that he would take care of her interests; and that when she was in Cuba in the summer of 1946 she learned that her father was about to sell them. She returned to Montclair to assert her claim and on one occasion when she attempted to gain entrance into the house by breaking a window, she was arrested at her father's instance. Unfortunately the relations between the Petitioner and her father had become unduly bitter—a situation obviously engendered by ill feeling between Petitioner and

her father's second wife whom he married in 1934 when Petitioner was thirteen years old. Hence, the controversy as to the ownership of the chattels in question appears to have arisen to a large extent from the conflicting interests of the Petitioner and her step-mother. It may be that the position in which Mr. Horton finds himself is due to his desire to compose the situation between his daughter and his second wife. That he was unsuccessful is due entirely to the fact that he failed to realize that, regardless of the emotional element involved, his primary—in fact his sole—legal obligation was to his daughter whose fiduciary he was and to whom, as such, he owed the explicit duty not only to see that her legal rights were fully protected, but more importantly that she be apprised of any claim of his own which was detrimental to her interests.

The position of the Petitioner is that her father's actions in the performance of his duty as Executor disarmed her to the extent that she has been deprived of her day in Court; that while it is true that she received the requisite legal notices of the settlement of the Intermediate Account in 1939 and of the Final Account in 1945, she did nothing with reference thereto because her father had assured her that her interests would be taken care of. This obligation rested on him without such assurance. It is admitted by the Respondent that the chattels which are the subject of this controversy were in the family home on Warren Place, Montclair at the time of the filing of the Final Account and that at least a substantial part of them were being used in the ordinary course of the family living.

He further admits that he never discussed the accounts with his daughter. The fact that he claimed the items in question was not brought to the attention of this Court.

During the taking of the testimony the Court took the position that there was not then before it for disposition the question as to whether Mr. Horton or the deceased was the owner of the chattels at the time of the latter's death; but the Court also ruled that the question as to

whether or not the Petitioner could establish a substantial *prima facie* claim to the chattels would have a bearing upon the issue as to whether or not fraud had been perpetrated upon her. As bearing on that point, sufficient testimony was taken to indicate the contention of the respective parties. Mr. Horton admitted that at least a substantial portion of the chattels in question had been purchased by his wife during her life time with her own funds, and he made no claim of any gift having been made by her to him. His claim to the ownership to the chattels was based entirely upon his testimony of a verbal agreement made between him and his wife in 1931. He stated that at that time he, with his own funds, purchased their home in Montclair and placed the title thereto in the name of himself and his wife as tenants by the entirety, and that in consideration of his having done so, his wife orally agreed that her personal property should also be considered as being jointly owned by her and him and go to the survivor. (Transcript p. 134). His claim in that respect is not convincing. He admitted that he had not informed his daughter of his claim until October, 1946, after he had advertised it for sale, and when asked why he had not, said that "she would have made a scene if I had taken that stand." (Transcript p. 160). He never informed his co-executor of his claim before the institution of these proceedings. The original inventory was prepared by the co-executor whose representative visited the home of the deceased shortly after her death, at which time Mr. Horton pointed out a few personal articles belonging to his wife. No mention was made of the other valuable assets and no questions were asked by the co-executor. Obviously, in view of the second clause of the will, it was the duty of the co-executor to pursue its inquiry further than it did.

If the claim to these chattels had been made not by Mr. Horton, one of the executors, but by a third party, it undoubtedly would have been the duty of the executors not only to resist such claim, but to have seen to it that the

Petitioner had knowledge of it and given an opportunity to protect herself. This duty was rendered more solemn by the mere fact that the claimant happened to be not only an executor of the estate but the father of the beneficiary.

From all of the above circumstances I find as a fact, that at least a substantial part of the personal assets were *prima facie* owned by the deceased at the time of her death; that it thereupon became the duty of the executors to include those assets in the inventory and accounts; that the failure to so include them was because of the questionable claim thereto by Mr. Horton; that the fact that he made such claim was withheld from this Court and from the Petitioner until after the approval of the Intermediate and Final Accounts; that this Court was thereby prevented from passing upon the merits of his claim; and that the procurement of the approval of said accounts, therefore, was obtained through the fraud of the Respondent, Paul J. Horton, and by reason of the mistake of the co-executor in not having examined into the facts and performing its obligation to the Petitioner by informing her of them.

The decrees of this Court approving the Intermediate and Final Accounts of the Respondent will be vacated to the end that the Petitioner may file exceptions thereto.

If these proceedings are persisted in by the parties, there will be involved extended hearings concerning the ownership of a great number of the chattels some of great and some of negligible value. Such proceedings should be avoided if possible. Enough has been heard in the testimony already taken to indicate to the Court that as to the chattels purchased by the first Mrs. Horton during her lifetime, all of them passed to the Petitioner under the Second clause of the will excepting as title thereto may be established by her father. As indicated above the entire basis of his claim is a conversation he claims to have had with his wife in 1931. There were apparently no witnesses to the conversation or any corroboration thereof. Without at this time deciding the question, it seems obvious that

such testimony would not be sufficient to establish his claim. Evidence of a gift made under similar circumstances has frequently been held insufficient. (*Melosh* v. *Melosh*, 127 N. J. E. 259, and the cases cited therein.)

There is another apparent bar to the establishment by the father of his claim which was not raised at the hearing in this matter. On the hearing of the exceptions, which may be filed to the accounts pursuant to this finding, the burden of proof undoubtedly would be upon Mr. Horton to prove the agreement with his wife because he would be urging a claim on his own personal behalf against himself in his representative capacity. He would then be faced with the necessity of proving his claim by testimony of his conversation with the deceased which he says took place in 1931. Such testimony would undoubtedly be refused by the Court as violative of the provisions of the Evidence Act (Rev. St. 2:97-2) which prohibits the establishment of a claim against the deceased by testimony of the claimant as to any transaction with the deceased except as provided in the statute. In this case it would seem that the introduction of such testimony must necessarily be by Mr. Horton in his individual capacity and not as the personal representative of the deceased and therefore should properly be barred. (*Wilson* v. *Terry*, 70 N. J. Eq. 231, aff. 71 N. J. Eq. 785). These questions, of course, are not being determined at this time, but are indicated to the parties with the hope that, having them in mind, a disposition of this matter may be made without further acrimonious litigation.

An appropriate Order should be presented on notice, opening the former decrees and allowing the Petitioner a reasonable time within which to file her exceptions. The matter of costs and counsel fees will be held in abeyance.

Dated: June 17, 1947.

(Sgd.) Joseph E. Conlon,
Judge.

## Memorandum.

August 20, 1948.

Messrs. McCarter, English & Studer (Mr. George W. C. McCarter), for Appellant, Paul J. Horton, Individually and Executor, etc.

Messrs. Riker, Emery & Danzig (Messrs. Edward J. Brown and Charles W. Kappes, Jr.), for Appellant, Fidelity Union Trust Co., Trustee, etc.

Messrs. Milton M. and Adrian M. Unger (Mr. Milton M. Unger), for Respondent, Inez Horton Gay.

Bigelow, V. C.:

This is an appeal from an order of the Essex County Orphans' Court opening decrees which had passed the intermediate and final accounts of Paul J. Horton and Fidelity Union Trust Company, as executors of the will of Inez H. Horton, deceased.

The two accounts were just and accurate statements of the transactions of the Trust Company as executor and included all assets of testatrix that came within its control or of which it had knowledge. But respondent charges that testatrix, at the time of her death, had certain other assets which came into the possession of the co-executor, Colonel Horton, and which he fraudulently pretended to own individually; that had the Trust Company been more alert, it would have ascertained this fact, but that it negligently failed to do so. The Orphans' Court, without definitely determining the title to the disputed assets, on the ground of Colonel Horton's fraud and the Trust Company's mistake, opened the settlement of the accounts as against both executors.

The will of Mrs. Horton was made in 1925, at a time when she had two children, Henry, who predeceased his mother, and Inez, who is now Mrs. Gay. To the little girl she bequeathed by the second clause of her will "all my

jewelry, silver, linens and personal articles". The residue of her estate she left in trust for the two children, or on the death of either without issue, then all for the survivor.

Mrs. Horton died seven years later. As soon as the will was probated, Mr. Lott, trust officer of the corporate executor, went with appraisers to the Horton residence in Montclair, where Colonel Horton pointed out those items which he said were Mrs. Horton's, and these were appraised and listed in the inventory that became the basis of the accounts.

> "Did you ask him whether anything else in the house was included in his wife's estate? Oh, yes. * * * He said these were the items.
>
> "Just these and no more? Exactly.
>
> "In making the inventory, you relied upon the statement which he made to you? Of course.
>
> "And made no further effort to ascertain whether any of the other articles in the house in fact belonged to his wife's estate? Nothing more than that."

The inventory included mortgage certificates and cash, $20,668, and jewelry, miscellaneous effects and clothing, appraised at $232. No linens or silver were listed.

The learned judge of the Orphans' Court said:

> "Obviously, in view of the second clause of the will, it was the duty of the co-executor (the Trust Company) to pursue its inquiry further than it did. If the claim to these chattels had been made not by Mr. Horton, one of the executors, but by a third party, it undoubtedly would have been the duty of the executors not only to resist such claim, but to have seen to it that the Petitioner had knowledge of it and given an opportunity to protect herself. This duty was rendered more solemn by the mere fact that the claimant happened to be not only an executor of the estate but the father of the beneficiary."

And the court concluded that approval of the accounts was obtained through Horton's fraud and "by reason of the mistake of the co-executor in not having examined into the facts and performing its obligation to the petitioner (Mrs. Gay) by informing her of them."

The court speaks of "the claim to these chattels" as if, back in 1932, the Trust Company was aware that there was a question whether certain articles, for example, a large Reed & Barton silver tea set, were the property of Mrs. Horton or her husband. But such was not the situation. When the inventory was made, when the accounts were settled, the Trust Company knew nothing of the chattels which Mrs. Gay asserts were her mother's, or that there was any question of title involved in the administration of the estate. It had no information to impart to her pertinent to this controversy.

The appellee was eleven years old when the inventory was made. The Trust Company was then under no duty to discuss any feature of the estate with the child. Although she had reached the age of eighteen years when the intermediate account came on for settlement, our law still deemed her too young "to protect herself". Nothing that the Trust Company might have told her could put the burden of action on her or lighten the obligation of the Trust Company. And conversely, no failure to impart information to the minor increased her rights or prejudiced the Trust Company.

The infant attained her full age before the settlement of the final account, and still the Trust Company, as executor, was under no duty at law or in equity to keep her informed of the progress of the administration, or the problems arising, except by the formal accountings, or by such notices as our statutes or rules require. Executors, in order to protect themselves by acquiescence, sometimes consult the beneficiaries, and generally as a courtesy they answer inquiries from the beneficiaries. The first time that Mrs. Gay made inquiry of the Trust Company in connection with

any of the matters now in controversy was more than a year after the final account was passed.

Was it the duty of the Trust Company, in view of the second clause of the will, to pursue further than it did, its inquiry what testatrix owned at her death? Presumably the contents of the home belonged to the husband rather than the wife. *State* v. *Kamuda* (Vt.), 129 A. 306; *Kauffman* v. *Stenger* (Pa), 30 A. (2) 239. Nothing in the will indicated that the articles disposed of by the second clause were worth enough to tempt the cupidity of testatrix' husband. A value of $300 was as likely as a value of $3,000. But the clause did suggest that, when the will was made, Mrs. Horton had silverware and linens. Colonel Horton assured Mr. Lott, in effect, that seven years later, at her death, she had none. Mr. Lott might have cross examined: "That tea set over there on the sideboard, didn't that belong to your wife? Where is your receipted bill for it?" Or Mr. Lott might have gone to testatrix' mother, Mrs. Stengel, and asked what she knew of her daughter's belongings. But I am satisfied that the Trust Company was under no duty to make further investigation than it did. Colonel Horton was not only the husband of testatrix, but she had shown her confidence in him by appointing him executor. His co-executor could properly exhibit the same confidence. There were no circumstances to raise a suspicion that Colonel Horton was guilty of the fraudulent conversion with which Mrs. Gay charges him.

Should it appear that Colonel Horton is actually guilty as charged, still his co-executor, the Trust Company, would not be responsible. Each of two or more executors has the same right as the others to the custody of assets of the estate, and each generally is accountable only for the assets that come into his possession or under his control. His liability for assets received and wasted by his co-executor is limited to cases in which he knows of the misapplication and makes no effort to require a proper administration of

the assets. *English* v. *Newell,* 42 N. J. Eq. 76; 43 id. 295; *Weyman* v. *Thompson,* 52 N. J. Eq. 263.

The proofs show affirmatively that the accounts include all the assets for which the Trust Company was responsible and that the decrees approving the accounts accurately measure its liability. There was no mistake so far as it was concerned. The decrees therefore should not have been opened as against this appellant.

The case of Colonel Horton is on a different footing.

Counsel appear to be in agreement with each other and with the learned Orphans' Court judge as to the issues presented to that court and I will accept their position. But I will state briefly my own view of the matter which is quite different:

The typical fraud or mistake for which an accounting is opened, occurs in the drawing of the account itself—the intentional or inadvertent omission or duplication of an item, or putting in a wrong figure—although, of course, the fraud or mistake may take another form. For instance, some device to prevent the beneficiary from excepting, or from attending the hearing. *Brown* v. *Fidelity Union Trust Co.,* 126 N. J. Eq. 406, at 443, illustrates what is not fraud for which a decree may be opened. A trustee had made illegal investments in securities in which it was itself interested. If there was any fraud, it was in making the investments and not in procuring the decree, for the investments were shown in the account and were approved.

An account that is just and true, both as to charge and discharge, is not the product of fraud or mistake, and the settlement of the account should not be disturbed. It should not be opened unless the court definitely determines that certain items ought to have been included, but were omitted from fraud or mistake. On such a finding, the account is not opened generally, but only in respect to the omitted items and such matters as may be affected by adding them to the account. The real battle occurs on the

proceeding to open and not thereafter, when the account is restated. The resettlement merely carries into effect the directions in the order opening the accounting. Such, I believe, has been the accepted procedure from *Stevenson* v. *Phillips*, 15 N. J. Eq. 236, to *In re Riland*, 133 N. J. Eq. 152. In the case at bar, Mrs. Gay assented, and Colonel Horton denied, that the silver tea set and other articles were assets of the estate. This issue of title, it seems to me, called for a definite decision by the court, one that would be conclusive in later stages of the proceeding. If Colonel Horton prevailed on this issue, his accounts were true and should not be disturbed. If Mrs. Gay established that testatrix, at her death, owned these articles, or certain of them, Colonel Horton omitted them fraudulently or by mistake, and the accounts should have been opened to the end that the articles to which testatrix' title had been thus established might be charged to his account.

The conversations between Colonel Horton and Mrs. Gay seem to me entirely unimportant. She was his daughter, still under age at the first accounting, and only 24 years old at the second. Nothing that was said on these occasions, or that either party claims was said, adds anything to the case.

Such is my view. The Orphans' Court held that the proofs required a judicial determination of the title, and further held as urged by counsel that such a determination must be postponed until the decrees were first opened. But they could be opened only for fraud and since a finding that the accounts were false had been excluded as a basis, the court was driven to seize on very small matters to spell out fraud. I see no fraud in the case unless the accounts were actually false, but I agree that Mrs. Gay should be allowed to have settled the question whether testatrix was the owner of any of the chattels. Ordinarily this would lead to sending the case back to the Orphans' Court to take more testimony and to decide the title question before, rather than after, the decrees were opened. But counsel

for the appellant vigorously objects, and therefore the order will be affirmed as to Colonel Horton to the end that the controversy be heard on exceptions to the accounts. The Trust Company may have its costs from the estate. The other parties shall presently bear their own costs, with leave to apply to the Orphans' Court in this respect after the accounts be finally settled.

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## Opinion.

Submitted January 10, 1949. Decided.

Motion to dismiss appeal.

Mrs. Inez Horton Gay, *pro se* as appellant.

Messrs. Riker, Emery & Danzig (Mr. Charles W. Kappes, Jr., of counsel) for respondent.

*Per Curiam:*

Motion is made to dismiss the appeal from the final judgment of the Appellate Division of the Superior Court in the above entitled cause as not taken within time. The judgment was entered in the office of the Clerk of the Superior Court on October 13, 1948. Notice of appeal therefrom to this court was filed December 3, 1948. Rule 1:2-5 requires such an appeal to be taken within 45 days after the entry of the judgment appealed from. The present appeal is therefore out of time and Rule 1:7-9 provides that the time for taking an appeal may not be extended.

The motion to dismiss the appeal is granted.

## Ruling.

OFFICE OF THE CLERK
SUPREME COURT OF NEW JERSEY
State House Annex
Trenton, N. J.

Charles K. Barton
Clerk

February 21, 1949.

Mrs. Inez Horton Gay,
88 Grove St.,
Montclair, N. J.

Riker, Emery & Danzig, Esqs.,
744 Broad St.,
Newark, N. J.

In re Estate of Inez S. Horton.

Dear Sirs:

The Court today denied the motion to review the dismissal of the appeal in this case.

Your very truly,

JOHN H. GILDEA

## Will.

I, Inez Stengel Horton, of the Town of Montclair, in the County of Essex and State of New Jersey, being of sound and disposing mind, memory and understanding, do make, publish and declare this my last Will and Testament in manner following, that is to say:

First: I direct the payment of all my just debts, funeral and testamentary expenses as soon as convenient after my decease.

Second: I give and bequeath all my jewelry, silver, linens and personal articles to my daughter, Inez Stengel Horton.

Third: All the rest, residue and remainder of my estate, both real and personal, wheresoever situate and of whatsoever constituted, I give, devise and bequeath unto my son, Henry Stengel Horton, and my daughter, Inez Stengel Horton, share and share alike, but I direct that the same shall be held by my executors in trust for them, investing and reinvesting the same, paying to them the net income therefrom in equal shares, until they respectively attain the age of thirty years, at which time I direct that the principal shall be paid over to them, share and share alike, for their own use and benefit. If either my said son or daughter shall die before reaching the age of thirty years, leaving issue surviving, I direct that such issue shall take the share the parent would have taken if living; but if either of them shall die before reaching the age of thirty years, without leaving issue surviving, I direct that the survivor shall take the entire estate upon reaching the age of thirty years. If at any time during the continuance of said trust, it shall be either necessary or advisable, in the judgment of the trustees, to expend any part of the principal of said trust for the care, comfort, education or maintenance of my said children, then and in every such event, I authorize and direct said trustees to use so much of the principal as they

shall deem either necessary or advisable for that purpose. If I shall leave any other child or children me surviving, I direct that such child or children shall share with my said son and daughter, equally in my estate, both as to income and principal and under the same terms, conditions and trusts.

FOURTH: In making this disposition of my estate, I have left my jewelry, silver, liens and personal articles to my daughter, not with any wish to discriminate in any way against my said son, but because these articles I believe will be of more use to her than they would be to him, and because I have the assurance of his father that he will arrange, either by gift or testamentary disposition of his estate, to compensate him for any difference in value between what is given to him herein and to my said daughter.

FIFTH: I hereby revoke, cancel and annul any and all wills and codicils by me at any time heretofore made.

SIXTH: I nominate, constitute and appoint my husband, Paul J. Horton, and the Fidelity Union Trust Company of Newark, New Jersey, and the survivor of them, the executors of and trustees under this my last will and testament, and give to them and the survivor of them, either as executors or as trustees, full power and authority to sell and dispose of any and all property, real or personal, of which I may die seized or possessed or which may become part of my estate, either at public or private sale and upon such terms and conditions as they or the survivor of them shall deem for the best interest of my estate, and to make good and sufficient conveyances in the law therefor; and further I direct that no bond shall be required of them, or either of them, either as executors or as trustees, for the administration of my estate in any jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Twenty-fourth day of August, Nineteen Hundred and Twenty-five.

INEZ STENGEL HORTON (S)

The foregoing will, consisting of three typewritten pages, including this page, each page identified by the signature of the said Inez Stengel Horton on the margin thereof, was signed, sealed, published and declared by the said Inez Stengel Horton as and for her last will and testament in the presence of us who were present at the same time and who, thereupon, at her request, in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

WALTER H. SEWARD, Newark, New Jersey.

DANIEL L. CAMPBELL, Newark, N. J.

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**Judgment of Modification.**

Entered October 13, 1948

These appeals coming on to be heard in the Prerogative Court in the presence of Riker, Emery & Danzig, appearing by Edward J. Brown and Charles W. Kappes, Jr., attorneys for the appellant, Fidelity Union Trust Company, as one of the Executors of and Trustees under the Last Will and Testament of Inez S. Horton, deceased, and of McCarter, English & Studer, appearing by George W. C. McCarter and Merritt Lane, Jr., attorneys for the appellant, Paul J. Horton, individually and as one of the Executors of and Trustees under the Last Will and Testament of Inez S. Horton, deceased, and of Milton M. and Adrian M. Unger, appearing by Milton M. Unger, attorneys for the respondent, Inez Horton Gay; and the Court having considered the matter and having filed its opinion prior to the 15th day of September, 1948;

*Judgment of Modification.*

IT IS, on this 6th day of October, 1948, ORDERED, ADJUDGED and DECREED:

1. Upon the appeal by the appellant, Fidelity Union Trust Company, as one of the Executors of and Trustees under the Last Will and Testament of Inez S. Horton, deceased, the order appealed from, made by the Essex County Orphans' Court on July 21, 1947, be and the same hereby is in all things reversed and set aside as to the appellant, Fidelity Union Trust Company, as Executor and Trustee as aforesaid.

2. The inventory and appraisement filed in the decedent's estate on August 22, 1939 and the Executors' accounts approved and allowed by the decrees of the Essex County Orphans' Court entered September 12, 1939 and July 17, 1945 are in all things just and correct and are hereby ratified and confirmed in every and all respects whatsoever, in so far as they apply to or affect Fidelity Union Trust Company, as Executor and Trustee as aforesaid, and the petition of the respondent, Inez Horton Gay, be and the same is hereby dismissed as to the appellant, Fidelity Union Trust Company, as one of the Executors of and Trustees under the Last Will and Testament of Inez S. Horton, deceased.

3. Upon the appeal by Paul J. Horton, individually and as one of the Executors of and Trustees under the Last Will and Testament of Inez S. Horton, deceased, the order appealed from entered by the Essex County Orphans' Court on July 21, 1947 by the said Paul J. Horton be and the same hereby is affirmed.

4. There is hereby allowed to Riker, Emery & Danzig, attorneys for the appellant, Fidelity Union Trust Company, as Executor and Trustee as aforesaid, a counsel fee of $750.00 and costs to be taxed, including their disbursements of $466.43, all of which shall be paid from the corpus

of the trust estate of Inez S. Horton, deceased. The other parties shall presently bear their own costs with leave to apply to the Court below in this respect after the accounts be finally settled.

5. The record shall be remitted to the County Court of Essex County, Probate Division, to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of the Prerogative Court and this judgment.

For the Court,

NATHAN L. JACOBS,
SJAD

Approved as to form only.

RIKER, EMERY & DANZIG,
Attorneys for Appellant, Fidelity Union Trust Company, as one of the Executors of and Trustees under the Last Will and Testament of Inez S. Horton, deceased.

MCCARTER, ENGLISH & STUDER,
Attorneys for Appellant, Paul J. Horton, Individually and as one of the Executors of and Trustees under the Last Will and Testament of Inez S. Horton, deceased.

MILTON M. & ADRIAN M. UNGER,
Attorneys for Resopndent, Inez Horton Gay.

## Notice of Appeal.

NOTICE IS HEREBY GIVEN that Inez Horton Gay appeals to the Supreme Court of New Jersey from that portion of the judgment of modification, entered in the Superior Court of New Jersey, Appellate Division, dated October 6, 1948, wherein the judgment of the Essex County Orphans' Court was reversed as to Fidelity Union Trust Company as executor and trustee, and wherein by said judgment of modification the executor's accounts were approved and allowed as to the Fidelity Union Trust Company.

EDWARD TERNER,
Attorney for Inez Horton Gay,
Appellant.

Dated: December 3, 1948 (Sgd.) INEZ HORTON GAY

To:

Messrs. McCARTER, ENGLISH & STUDER,
Attorneys for Paul J. Horton, individually
and as executor; and

Messrs. RIKER, EMERY & DANZIG,
Attorneys for Fidelity Union Trust Company, executor and trustee.

## Motion to Dismiss Appeal.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of New Jersey:*

The respondent, Fidelity Union Trust Company, as one of the executors of and trustees under the last will and testament of Inez S. Horton, deceased, moves to dismiss the appeal in this action taken to this court by the appellant, Inez Horton Gay, pursuant to Notice of Appeal served December 3, 1948 and filed with the Superior Court, Appellate Division, on December 3, 1948.

The respondent, Fidelity Union Trust Company, as executor and trustee as aforesaid, moves for the reasons that:

1. The appeal was not taken within time; and

2. This appeal from a final judgment of the Appellate Division of the Superior Court does not fall within any of the classes of cases wherein an appeal may be taken to this court under Article VI, Section V, Paragraph 1 of the New Jersey Constitution of 1947 and Rule 1:2-1. Said judgment is printed in the Appendix attached hereto.

There is annexed to this motion a supporting brief stating the objects of the motion and the facts on which it is based, together with relevant argument and an appendix containing relevant matters from the record.

Dated: December 16, 1948.

RIKER, EMERY & DANZIG,
Attorneys for Respondent,

By EDWARD J. BROWN,
The Member Acting for the Firm.

CHARLES W. KAPPES, JR.,
Of Counsel.

## Reply Brief of Appellant.

### On Motion to Dismiss Appeal.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of New Jersey:*

The appellant in reply to the motion to dismiss the appeal states that:

The motion should be dismissed and the appeal permitted to lie.

### Appellant's Argument.

The appeal is from an adjudication made in a cause instituted prior to the adoption of the 1947 Constitution, its establishment of the Court thereunder, and the Rules now in effect.

Under the spirit of justice as manifested by the provisions thereof, the appeal should be permitted.

Since an appeal would have been permitted to the Court of Errors and Appeals under the provisions in effect at the institution of this action within 3 months of the date of the filing of the judgment appealed from appellant therefore contends that the notice of appeal is also within time.

Dated: December 27, 1948

Inez Horton Gay,
Attorney *pro se.*

## Motion to Extend Time for Filing Briefs and Appendices.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of New Jersey:*

The plaintiff-appellant moves to extend the time for filing briefs and appendices on the matter on the appeal served December 3, 1948 in the above matter and filed with the Clerk of the Supreme Court on December 3, 1948.

The plaintiff-appellant so moves for the reason that on December 17, 1948 notice was served by the Fidelity Union Trust Company to dismiss the appeal. On December 27, 1948 plaintiff-appellant filed an answering brief with the Supreme Court.

On December 29, 1948 the plaintiff-appellant prepared a verified petition presently being filed with the Supreme Court seeking relief in *Forma Pauperis.*

Petitioner therefore respectfully requests this Court to grant a reasonable extension of time in which to prepare and file briefs and appendices in this appeal, pending decision by the Court on the above matters.

Dated: December 31, 1948

INEZ HORTON GAY,
Attorney *pro se.*

## Motion to Review Dismissal of Appeal.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of New Jersey:*

The plaintiff-appellant moves to respectfully request on the above matter that the dismissal of the appeal be reconsidered and reviewed under the light of the facts mentioned below and that the appeal be allowed to lie.

### Argument.

1. The appeal is on a cause instituted and entirely heard under the Old Rules of Civil Practice. Opinion of the Prerogative Court was rendered August 20, 1948, which is prior to September 15th, 1948. The Order of Modification happened to be signed after September 15th, 1948, due to too long a delay, almost two months elapsed before the order was finally signed.

2. The opinion by Vice Chancellor Bigelow was rendered under the title of New Jersey Prerogative Court, and was dated August 20, 1948, almost a month previous to the effective date of the change in the Rules.

3. The Order of Modification was dated October 6th, 1948, and it was purportedly filed October 13th, 1948, almost two complete months after the opinion was rendered, and therefore precluding the possibility of filing an appeal under the old Rules if a hard and fast interpretation was to be given to the effective date of the New Rules. This Order was headed Appellate Division of the Superior Court because my then counsel agreed to this order as to form without my knowledge or consent. The Order should have been entitled New Jersey Prerogative Court as was the opinion that gave rise to the Order, and signed prior to September 15th, and then no confusion could have possibly arisen.

4. Confusion did arise, so much so, that several learned Counsellors consulted for this purpose could not agree

whether I was under the new or old Rules. To be completely safe I endeavored to file within the time allowed in the new Rules.

5. Rule 1:7-10 of the new Rules of Civil Practice clearly states, and with no limitations of any kind, that: "These rules shall become effective on September 15th, 1948, and shall govern all proceedings *thereafter commenced, and so far as just and practicable,* all proceedings then pending." It is advanced that these proceedings were then pending legally, due to the too long delay experienced in securing the order and signing it properly, thus estopping me from appealing under the old rules, which I urged my then counsel to do, immediately after opinion was rendered. It is therefore very clear according to this Rule that my appeal can be allowed to lie without establishing dangerous precedent.

6. The attached affidavit conclusively shows that I was misled as to the date of filing of the order. Because I was ill, under medical care, and because I could not find a Counsellor who would pay printing expenses out of his own pocket with no retainer fee, I was forced to wait to file until the last date that was reliably told me to be my effective deadline under the new Rules, December 3rd, 1948.

7. The actual difference in time is only 6 days, counting all days; 3 days, not counting holidays (Election Day, Armistice Day, Thanksgiving Day); and I am well within time by both the old and the new Rules, if not counting Sundays which are legal holidays, according to the Constitution of the United States.

8. The learned authority Judge A. C. Clapp in his treatise on "Wills and Administration in New Jersey" makes these discerning statements: "The Court will not dismiss an appeal for a slight lapse '(and I contend there is no lapse in my case)' if there is shown a disposition to prosecute the appeal diligently and there appears to be some

grounds for appeal." (McKenzie *vs.* Minard, 67 A 936, in re: Ahrend 99 E 328, 133 A 758, in re: Faitoute, 102 E 17, 138 A 465.) The cases support the author's statement.

CONCLUSION.

Under Equity and conscience, it is respectfully submitted that my appeal be allowed to lie.

Great wrong and irremediable harm has been done to me by the respondent, the Fidelity Union Trust Company, due to its perfunctory and flagrantly frivolous discharge of its duties as a trustee and executor of my mother's estate.

Under the democratic laws of this country and the Constitution, I, as a citizen, have a right to my day in Court; and in Equity, which is written in essence in our Constitution, it is not allowable to deprive a free person of his legal rights through legalistic formalities, so far as it is just and practicable and it is just and practicable in this case.

It is inequitable and it amounts to a denial of justice if the Court declines to permit me to prosecute my appeal.

Oral argument is requested.

INEZ HORTON GAY
Attorney *pro se.*

## Affidavit of David H. Wiener.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

DAVID H. WIENER, being duly sworn upon his oath deposes and says:

1. I am an attorney at law of New Jersey and maintain offices at 17 Academy Street, Newark, New Jersey.

2. During the latter part of November 1948, Mrs. Inez Gay requested me to phone the Prerogative Court in Trenton to ascertain the date of the entry of the judgment of modification in the matter of the Estate of Inez S. Horton. I made this telephone call and after speaking with three different persons, I was advised that the judgment of modification was entered on October 19, 1948.

DAVID H. WIENER.

Sworn and subscribed to before me
this 27th day of January, 1949.

FRANK GONNELLA
A Notary Public of New Jersey
Notary Public of New Jersey
My Commission expires March 5, 1950

## Affidavit of Inez Horton Gay.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

INEZ HORTON GAY, being duly sworn on oath according to law do solemnly depose and say:

1. That I tried to appeal this case in August, 1948, but my then counsel refused to file notice of appeal due to my lack of funds.

2. Michael Andolino recommended Mr. David H. Wiener to me and Mr. Wiener, Counsellor at law, was considering prosecuting my appeal to the Supreme Court in November. I wrote Mr. Wiener November 4th, urging that from my point of view the appeal should be in 45 days after October 6th, but Mr. Wiener telephoned Trenton Hall of Records and was told that the order was entered or filed on *October 19th* and that I had 45 days from October 19th to file my notice of appeal. Mr. Wiener told me that if I wanted substantiation of this fact, I should call Trenton myself, but that it was not necessary. I did call Trenton myself, and Mr. Barton's office, to be *sure,* and Mr. Wiener's information that the order was entered on October 19th was confirmed to me by phone.

3. The weeks preceding December 3rd I was under doctor's care and unable to make the trip to Trenton to investigate the information given Mr. Wiener and me by telephone from Trenton. But I did not feel any personal investigation was necessary.

4. Taking the reliable word of Mr. Wiener and Mr. Barton's office, Mr. Edward Terner, a member of the bar without charge wrote my application to appeal on December 3rd, 1948, to hold my deadline.

5. On December 3rd I, personally, delivered the application to appeal to Mr. John Gilday in the Supreme Court office in Trenton who took me personally to Mr. Barton's

office. Mr. Gilday and Mr. Barton and another gentleman in Mr. Barton's office (whose name I do not recall) had a discussion whether the appeal was within time and whether I had appealed to the right Court. They decided that the appeal was on time and Mr. Barton accepted $0.34 as a fee from me and gave my case immediately a docket number. Later Mr. Edward Terner was sent a bill of $25.00 for filing fee, which I paid in addition to the $0.34 cash paid December 3rd.

6. The first inkling that I might be late was on December 17th, when the Fidelity filed a motion to dismiss my appeal on "time".

7. On December 27th, I filed, without counsel, a reply brief stating that I felt I was well within time because my appeal was on a cause where an opinion had been made before September 15th of a cause commenced before September 15th. But I did not elucidate in my brief that I had tried my best to be on time by both old and new Rules, by filing my application 45 days after the date I was *informed* the order was entered.

INEZ HORTON GAY.

Sworn and subscribed to before me
this 28th day of January, 1949.

E. JEANNETTE CARSON
A Notary Public of New Jersey

## Counter-reply Brief on Motion to Review Dismissal of Appeal.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of New Jersey:*

My appeal should be permitted to lie to allow me to prove that the learned Orphans Court Judge was entirely correct in opinion that the Fidelity Union Trust Company is guilty of negligence and that Vice-Chancellor Bigelow in reversing the wise Judge Conlon jeopardizes the rights of beneficiaries of wills as a whole, and particularly so in my case.

### Argument.

Respondent is incorrect in stating that I had the opportunity to present the facts set forth in my motion to review the dismissal of appeal at the time that I filed my reply brief on the motion to dismiss.

1. I filed my notice of appeal December 3rd, 1948. I was obliged to go to Flint, Michigan, for an oral deposition of a witness December 16th, 1948, for a replevin suit against my stepmother and father and in a false arrest and imprisonment suit against my stepmother, father and their private detective. I am acting without counsel in these suits.

2. I returned from Flint, Michigan, on December 24th, 1948, and to my utter surprise I found that there had been a motion filed by the Fidelity on the 17th of December to dismiss the appeal.

3. I studiously consulted the Rule Book to find how much time I had to answer the motion. I was greatly worried to find that I had to file my reply 10 days after December 17th. I had not studied sufficiently at the time to realize that Sundays and holidays were not counted.

4. The next day was Christmas Day and was followed by Sunday. I had all I could do to find the very scarce egg-shell paper required by the rules before closing time of the supply houses on December 24th, 1948.

5. By the time I found the paper, the typewriter shops were closed, so I could not rent a typewriter nor find anyone to do my typing.

6. I had never used a typewriter in my life, but after phoning several friends, I found a machine I could borrow on December 25th, and I went to work and laboriously typed 18 originals of my brief and 18 covers. I was under great handicap writing a lengthy brief, never having written a law brief before in my life, but I did the best I could with the Rule Book, and the borrowed typewriter. Had I thought it necessary to elucidate fully and completely, I would have never been able to make the deadline of 10 days.

7. Mr. David H. Wiener's affidavit was impossible to obtain over the Christmas week end, because he was in Florida; where, nobody could tell me.

8. It is therefore evident that the Fidelity is incorrect when they say that all the facts were readily available on December 27th, 1948, when I submitted my reply brief to the motion to dismiss.

CONCLUSION.

By Rule 1-7-10 of the Rules governing this Court at present, and which must have been written for unfortunates like me, and in Equity, and in the spirit of Justice which is manifest in our Courts, I should be allowed to prosecute my appeal.

INEZ HORTON GAY,
*Attorney pro se.*

## Affidavit of Solon Chadwick Reed.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } ss.:

I, Solon Chadwick Reed, of full age, being duly sworn according to law, on my oath, depose and say:

1. I am an attorney-at-law of the State of New Jersey and am associated with Riker, Emery & Danzig, attorneys for the respondent in the within cause.

2. At their request, I have consulted their files in connection with the proceedings of which the within cause is a part and find that the opinion of Vice Chancellor Bigelow in the New Jersey Prerogative Court in the matter entitled "In the Matter of the Estate of Inez S. Horton, deceased", dated August 20, 1948, was mailed by the Vice Chancellor's office to the attorneys for the respondent on August 23, 1948.

3. In 1948, Labor Day fell on Monday, September 6, and, accordingly, September 3 was the last day for the transaction of business in the courts prior to the Labor Day holiday.

4. After Labor Day, which fell on September 6, 1948, the only day on which Vice Chancellor Bigelow sat and on which the Judgment of Modification might have been submitted to him for signature was the following day, September 7. After September 7, in anticipation of the new judicial system going into effect, Vice Chancellor Bigelow, along with the other Vice Chancellors, did not sit.

5. The first day on which the Appellate Division of the New Jersey Superior Court sat for the purpose of entering judgments after the effective date of the aforesaid Judicial Article was October 6, 1948.

6. On October 6, 1948, Part A of the Appellate Division of the Superior Court of New Jersey sat in Newark, con-

sisting of Judges Nathan L. Jacobs, Howard Eastwood and John O. Bigelow.

7. Judge John O. Bigelow, who sat in Part A of the Appellate Division on October 6, 1948, was the same person who, as Vice Chancellor, handed down the aforementioned opinion in the New Jersey Prerogative Court.

8. I have made this affidavit at the request of the aforesaid attorneys for the respondent for the purposes of verifying certain statements made in the brief filed on behalf of the respondent in the within matter. The facts stated herein have been ascertained by me by examination of appropriate records and other competent sources.

SOLON CHADWICK REED

Sworn to and Subscribed before me this 6th day of May, 1949.

HELEN A. ZIMMER
Notary Public of New Jersey
My Commission Expires Mar. 22, 1953

(SEAL)